Ombudsman Report

Investigation into closed meetings by the council of the municipality of Central Huron on May 7, June 11 and July 26, 2012

André Marin
Ombudsman of Ontario
March 2013

Complaints

1 Our Office received a complaint regarding the closed meeting practices of council for the municipality of Central Huron. The complaint referred to closed meetings held on May 7, June 11, and July 26, 2012. The complainant alleged that these closed meetings were held without prior public notice.

Ombudsman jurisdiction

2 Under the *Municipal Act*, municipalities are required to pass by-laws setting out the rules of procedure for meetings. The law requires public notice of meetings, and that all meetings be open to the public, unless they fall within prescribed exceptions.

3 Citizens have the right to request an investigation into whether a municipality has properly closed a meeting to the public. Municipalities may appoint their own investigator or use the services of the Ontario Ombudsman. The Act designates the Ombudsman as the default investigator for municipalities that have not appointed their own.

4 My Office is the closed meeting investigator for the Municipality of Central Huron by default.

5 In investigating closed meeting complaints, our Office considers whether the open meeting requirements of the Act, and the relevant municipal procedure by-law, have been observed.

Investigative process

6 After conducting a preliminary review of the complaint, on September 27, 2012, our Office notified the municipality of Central Huron that we would be conducting an investigation.

7 During the course of our investigation, we obtained and reviewed relevant municipal documents, including motions, agendas, minutes, and notes. We also considered the municipality's procedure by-law, as well as the applicable legislation.

8 In accordance with s. 19(1) of the *Ombudsman Act*, members of council and municipal staff are required to provide our Office with any documents or information requested during the course of our investigations. Council members and municipal staff co-operated fully with our investigation.

9 A two-person team conducted 11 telephone interviews with members of council and relevant municipal staff.

Preliminary report

10 In accordance with our normal procedures, the municipality was given an opportunity to review a report containing preliminary findings and analysis, and to make any relevant representations before the report was finalized. Council and staff had the option of receiving a copy of the preliminary report for review upon signing a confidentiality undertaking.

11 Seven members of Council, two members of staff, and one former member of staff were provided with the preliminary report on a temporary basis, after signing confidentiality undertakings. We received two written comments on the preliminary report, and those comments were taken into consideration when finalizing this report.

Council meeting procedures

12 The municipality's procedure by-law (#40-2006) states that regular meetings of council are held on the second Monday of each month at 7 p.m. Special meetings can be called with 24 hours notice to members of council. The by-law does not specify how notice of special meetings is provided to the public.

13 The clerk is responsible for preparing the agenda and the by-law states that the agenda for council meetings will, "insofar as is practicable," be made available to members the Thursday prior to the meeting. The procedure by-law does not specifically provide for public posting of agendas, but the clerk explained that their practice is to post the current agenda on the municipal website the Friday prior to the meeting.

14 According to the procedure by-law, additions or amendments to the agenda may be requested by any member immediately following the Call to Order at

the meeting. A majority of council must approve the addition or amendment for it to receive consideration. However, the majority of those we interviewed advised that there is no formal process for adding items to the agenda, and that if a councillor wants to add something at the meeting, the items are generally just added to the agenda without the need for a vote.

15 With respect to *in camera* meetings, s. 10(a) of the procedure by-law states that meetings shall be open to the public unless the subject matter is:

- personnel matters;
- labour negotiations;
- property acquisitions, disposals or leases;
- advice of counsel re: matters of pending and potential litigation;
- insurance settlements;
- applications under the *Municipal Act* RSO 1990, c. M. 45, Section 442,
  for reduction and cancellation of taxes because of extreme illness or poverty.

16 This is not entirely in keeping with the language of s. 239(2) of the *Municipal Act, 2001* (the Act), which states that a meeting or part of a meeting may be closed to the public if the subject matter being considered is:

- the security of the property of the municipality or local board;
- personal matters about an identifiable individual, including municipal or local board employees;
- a proposed or pending acquisition or disposition of land by the municipality or local board;
- labour relations or employee negotiations;
- litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.

17 The Act also states that a meeting shall be closed to the public if the subject matter relates to the consideration of a request under the *Municipal Freedom of Information and Protection of Privacy Act*.

18 Section 239(2) of the Act lists the only exceptions under which council can or must meet *in camera*. Although some items listed in the by-law would fall within other exceptions, some may not. In order to ensure that council strictly complies with the requirements of the Act, council should review its by-law and should consider using the same wording that is contained in the Act.

Investigative findings

19 As a result of our investigation, we have determined that council contravened the open meeting requirements of the Act with respect to the May 7 and July 26 meetings, but that the closed meeting on June 11 was justified based on the exceptions contained in the Act.

May 7, 2012 meeting

20 The May 7 meeting was a regular council meeting. The agenda for the meeting was provided on the municipality's website.

21 No closed meeting items were on the agenda for May 7. At the beginning of open session, a councillor requested an *in camera* session "for the purpose of personal reasons." The minutes do not reflect that a majority of Council approved the addition to the agenda.

22 The resolution to proceed *in camera* indicated that the closed meeting was being held under s. 239(2)(b) of the Act – personal matters about an identifiable individual.

23 All of council attended the closed session, along with the acting chief administrative officer, the clerk, and the deputy clerk. Information provided to our Office indicates that council discussed two matters while *in camera*.

24 The first discussion involved naming a particular councillor to be the municipality's designated representative at the annual general meeting for ERTH Corporation, a provider of utility and energy services of which the municipality is a shareholder. During interviews we were advised that when this discussion began, staff noted that it was inappropriate for a closed session. This was not reflected in the minutes.

25 Staff told us that once it became clear that this item did not fit within one of the exceptions to the open meeting requirements, it was agreed that the discussion would take place after the closed session, during the open portion of the meeting.

26 We were advised that this matter had to be dealt with at the May 7 meeting because the corporation's annual general meeting was coming up at the end of the month.

27 The second item of discussion involved a councillor's concerns about the reporting style of a local journalist. We understand that council considered making a formal complaint to this journalist's employer, but in the end chose not to do so.

28 We were told that one municipal staff person did not believe the topic concerning the journalist was appropriate for closed session, and voiced this at the meeting. This was not reflected in the minutes. One councillor indicated to us that "council's displeasure with how things are reported" was not an appropriate matter for closed session. Three interviewees felt this subject was appropriate for closed session, as it involved personal matters about the named journalist.

29 We were told this particular discussion lasted only 3-4 minutes. The majority of those we interviewed said there was no urgency to this matter and it could have waited to be placed on the agenda for the next meeting.

30 After returning to the open meeting, council voted to appoint Councillor Barnim as the voting member at ERTH Corporation's annual meeting.

31 Nothing was said about the second item during the open portion of the meeting. We were advised that, generally, the only information provided when council reconvenes into open session is to pass any necessary motions arising from the closed session.

Analysis

31 The *Municipal Act* does not define "personal matters." However, the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* contains a similar phrase – "personal information" – that is defined. While the definition of "personal information" in *MFIPPA* does not dictate how the

phrase "personal matters" in the *Municipal Act* should be interpreted, it does provide a useful reference point.

32 Section 2(1) of *MFIPPA* defines "personal information" as follows:

"personal information" means recorded information about an identifiable individual, including, in part:

- the personal opinions or views of the individual except if they relate to another individual;
- the views or opinions of another individual about the individual; and
- the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

33 A 2007 decision of the Information and Privacy Commissioner[1] noted that in order to qualify as personal information, the information "must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official, or business capacity will not be considered to be 'about' the individual." This decision also stated that information relating to an individual in a professional capacity "may still qualify as personal information if the information reveals something of a personal nature about the individual."

34 The discussion in the closed meeting of a councillor's appointment as the municipal representative at corporate annual meeting does not involve any personal information and, as such, does not fit within the personal matters exception or any other exception. Based on the information provided, other council members and staff pointed this out during the meeting, and it was decided to continue the discussion in open session. The closed session minutes should have reflected this in order to ensure that the record of the meeting was complete and accurate.

35 With respect to the discussion about a journalist, it related to a councillor's concern about a headline, rather than to any personal matter. Accordingly, this topic did not fall within the personal matters exception contained in s.239 of the Act and should have been discussed in open session.

36 We were also not provided with any evidence to demonstrate why the discussion about the local journalist was so urgent and/or time sensitive that

[1] Order MO-2204, (Town of Aylmer) (June 22, 2007).

it needed to be added to the agenda at the last minute. Furthermore, both items discussed in closed session at this meeting were added to the agenda without following the requirements of the procedure by-law, which requires the approval of the majority of council before an item can be added.

37 Council should avoid adding items to the agenda at the last minute unless they are truly urgent and time sensitive so as to justify suspending the required notice procedures. When doing so, council should be careful to strictly follow the requirements of its own by-law.

June 11, 2012 meeting

38 The June 11 meeting was a regular council meeting, and the agenda was provided on the municipality's website. No closed meeting items were listed on the agenda for this meeting. A councillor requested that a closed meeting be held "to discuss a personal matter", and a resolution was passed to proceed *in camera*. The minutes do not indicate that a vote was taken to add this item to the agenda. No additional details were provided, other than reference to the exception.

39 The information provided to our Office indicates that, while *in camera*, council discussed a payroll matter pertaining to an identified staff member. The Chief Administrative Officer was directed to take steps to resolve the matter, however, no formal motion was passed to provide the direction.

40 We were told this matter was not on the agenda for the meeting because the problem only came to the attention of a member of council after the agenda was prepared. The majority of those we interviewed said the matter was urgent, because it was important to ensure the employee was paid correctly.

41 After reconvening in open session, council did not report on any matters that were discussed in closed session or pass any resolutions.

Analysis

42 The closed session discussion involved an identified employee's salary. An individual's salary, as opposed to a salary range for a position, qualifies as a

personal matter about an identifiable individual in these circumstances. This view is consistent with decisions of the Office of the Information and Privacy Commissioner of Ontario, which have considered whether information about an individual's salary was personal information protected from disclosure under the *Municipal Freedom of Information and Protection of Privacy Act* and the *Freedom of Information and Protection of Privacy Act*. (See for instance: Order M-5, Order 61, Order 183, and Order P-273.) Accordingly, this discussion appears to have fit within the personal matters about an identifiable individual exception.

43 Council directed the CAO to follow up on this matter, however, no vote was taken. Although voting is usually prohibited during a closed session, it is allowed if the meeting is otherwise properly closed to the public and the vote is for a procedural matter, or for giving directions or instructions to officers, employees, or agents of the municipality (s. 239(6)). For the sake of clarity, directions to staff should be included in a resolution and voted on. This helps avoid confusion among council members and staff about the exact nature of the direction being given.

July 26, 2012 meeting

44 The July 26 meeting was a Committee of the Whole meeting, and the agenda was provided on the municipality's website. No closed meeting items were listed on the agenda for this meeting. According to the open session minutes, toward the end of the meeting, the Mayor recommended that a closed meeting be held to discuss a matter involving ERTH Corporation. The minutes do not indicate that a motion was passed to add this item to the agenda. A resolution was passed to proceed *in camera* under the following exceptions:

- 239(2)(b) – personal matters about an identifiable individual
- 239(2)(c) – a proposed or pending acquisition of land
- 239(2)(f) – advice that is subject to solicitor-client privilege

45 While *in camera*, council discussed three matters. The first discussion pertained to a letter received on July 23 from a company the municipality had been in discussions with regarding a solar energy project. We were advised that this matter was discussed under the solicitor-client privilege exception. Although a few councillors initially said the municipality's legal counsel was present during the *in camera* session, we subsequently confirmed that this

was not the case. The solicitor did, however, attend an earlier meeting to provide advice on a related matter.

46 Those we interviewed told us there was no specific piece of legal advice under consideration at this closed session. The discussion was about the letter that was received on July 23.

47 We were told this matter was not on the agenda because the correspondence was received after the agenda was already prepared. Interviewees gave various reasons why this matter was urgent and could not be put off until the next council meeting, including that there was a deadline to finalize the solar project (although we were unable to verify what that specific deadline was), that it was important for council to have a chance to review the letter in a timely fashion, and that the Acting CAO was leaving shortly and council wanted to get this matter resolved before then.

48 The second *in camera* discussion on July 26 was a continuation of the June 11 discussion regarding the salary of an identifiable individual.

49 The third *in camera* discussion involved a possible lease agreement, and was closed to the public under the exception for acquisition or disposition of land.

50 According to the closed session minutes, council voted *in camera* to begin negotiations on the terms of the lease. The majority of those we interviewed believed this was a direction to the Mayor and the CAO to begin negotiations, although the vote was not worded as a direction. As noted above, directions to officers/staff should be clearly worded so as to avoid any confusion.

51 We were advised that the matter arose after the agenda had already been prepared, and accordingly was added at the last minute. Staff told us there was some urgency to the discussion because council did not want to wait another month (until the next council meeting) to begin negotiations on the lease. One member of council said the matter probably could have waited, but that it was nice for council to receive an update.

52 When council reconvened into open session, it passed a resolution to "confirm the decision made in camera." No other information was provided.

Analysis

53 With respect to the first discussion regarding the July 23 letter from the solar energy company, the information provided to our Office indicated that there was no specific legal advice being considered during this closed session. Rather, it appeared that the purpose of the meeting was to update council on the July 23 letter that was received.

54 The exception concerning solicitor-client privilege may be used when some advice from a solicitor or a related communication actually exists for council's consideration. Most interviewees advised our Office that there was no specific discussion of solicitor-client privileged communications during this closed session. Accordingly, this discussion does not fall within the exception under s. 239(2)(f). This portion of the closed session does not appear to have been justified under the Act.

55 The discussions about the salary of an identifiable individual and the lease agreement appeared to fit within the respective stated exceptions.

Resolutions authorizing closed session

56 The *Municipal Act* requires that before holding a closed session, a resolution must be passed in open session stating the fact that a closed meeting will be held as well as the general nature of the subject matter to be considered. (s. 239(4)).

57 In all meetings we reviewed, council passed a resolution before entering into closed session, as required by the Act. However, the issue under consideration was described simply by repeating a reference to the wording of the exception under the Act that council was relying on to proceed *in camera*.

58 Such resolutions should provide meaningful information about the issue to be discussed, subject to confidentiality concerns. As noted by the Ontario Court of Appeal in *Farber v. Kingston City*[2] "the resolution to go into closed session should provide a general description of the issue to be discussed in a way that maximizes the information available to the public while not undermining the reason for excluding the public."

[2] [2007] O.J. No. 919, at page 151.

59 It is my view that the *Municipal Act* requires at least a brief description of the issue under discussion in the resolution. This should go beyond a mere recitation of the language of the Act wherever possible.

60 In cases where multiple issues will be discussed *in camera*, such as during the July 26 meeting, for the sake of clarity council should also specify which item will be discussed under which exception.

Record-keeping practices

61 In accordance with s. 239(7) of the *Municipal Act*, a municipality is required to record, without note or comment, all resolutions, decisions and other proceedings at its meetings.

62 During our investigation, we noted that the municipality's closed meeting minutes do not always seem to record what occurred during its *in camera* sessions. For example, during the June 11 closed session it appears a discussion took place that one of the closed session items properly belonged in open session. This discussion was not captured in the minutes.

63 Ideally, a written record of a closed meeting should include reference to:

- where the meeting took place;
- when the meeting started and adjourned;
- who chaired the meeting;
- who was in attendance, with specific reference to the clerk or other designated official responsible for recording the meeting;
- whether any participants left or arrived while the meeting was in progress and if so, at what time this occurred;
- a detailed description of the substantive and procedural matters discussed, including reference to any specific documents considered;
- any motions, including who introduced the motion and seconders; and
- all votes taken, and all directions given.

64 While the Act prohibits "notes or comments" from being included in the official record, this does not mean that the subjects discussed in a meeting should not be documented. The various substantive and procedural items that were discussed at a meeting should be recorded. The requirement to keep a meeting record should be interpreted in a manner that is consistent with the

intent of the municipal meeting provisions, which are directed at enhancing the openness, transparency and accountability of municipal government.

65 In the interests of transparency, a number of Ontario municipalities record audio or allow for the broadcast of their open meetings. This is a sound and reasonable approach, as it helps to ensure that there is a clear, comprehensive and accessible meeting record.

66 Several jurisdictions in the United States require that municipal closed meetings be electronically recorded or videotaped, and others have adopted this practice to enhance the accountability and transparency of their proceedings. For example, the Illinois *Open Meetings Act* states that all public bodies must keep a verbatim record of all their closed meetings in the form of an audio or video recording[3]. Similarly, Iowa's legislation[4] requires that audio recordings be made of all closed sessions, and Nevada requires that public bodies record audio of open and closed meetings or use a court stenographer to transcribe the proceedings[5].

67 As I noted in my 2011-2012 Annual Report on Closed Municipal Meetings,[6] the practice of audio recording both open and closed meetings is in the interest of all of Ontario's municipalities. It would demonstrate they are confident they are following the rules, and would inspire community trust in the transparency and accountability of local government. It would also save time and resources for all of us. Having a clear, accessible record for closed meeting investigators to review would mean that many investigations would take no longer than the time needed to review the recording – and a great deal fewer interviews would be required. In the past few months a number of municipalities have moved forward on this issue and I look forward to this practice becoming widespread.

Additions to the agenda

68 The municipality has established a specific process in its procedure by-law to be followed when adding items to a meeting agenda. A majority of council must approve the addition or amendment for it to receive consideration.

---

[3] 5 ILCS 120/2.06

[4] Iowa Code § 21.5(4)

[5] N.R.S 241.035(4)

[6] This report can be found online here: http://www.ombudsman.on.ca/Resources/Reports/2011-2012-OMLET-Annual-Report.aspx

69 Our review of the proceedings of the May 7, June 11, and July 26 meetings suggests that council has not observed this procedural requirement. At all three meetings, closed session items were added at the last minute without the approval of the majority of council. It appears that at least one of the items discussed was not urgent, and could have been placed on the agenda for the next council meeting, in order to provide notice to the public.

70 In other cases – such as the correspondence discussed under the solicitor-client privilege exception at the July 26 meeting – it appears that the agenda could have been amended in order to provide more notice to the public that certain matters would be discussed. In that case, council received the letter on July 23, and therefore had three days prior to the council meeting during which an amended agenda could have been posted.

71 While council does have the authority to add items that have not been the subject of prior notice to the public, it should do so sparingly and treat this as an exceptional process. Matters should not be added at the last minute unless they are truly urgent and/or time sensitive such that there is a compelling reason to justify suspending the normal rules.

Reporting back in open session

72 It is not the municipality's practice to report back in open session about what occurred during an *in camera* meeting, except to the extent that certain motions are voted on in open session that refer to votes taken in closed session.

73 I encourage municipalities to report publicly in open session on what transpires in closed session, at least in a general way. In some cases, public reporting might simply consist of a general accounting in open session of the subjects considered in closed session – similar to the information in the resolution authorizing the session, together with information about staff directions, decisions and resolutions. In other cases, however, the nature of the discussion might allow for considerable information about the closed session to be provided.

Opinion

74 Our investigation confirmed that the council for the Municipality of Central Huron held illegal closed meetings on both May 7 and July 26:

- Council discussed two items under the personal matters exception at the May 7 meeting, which did not fit within the parameters of that or any exception. However, council recognized that the first item was not appropriate for an *in camera* session and moved the discussion to the open session.
- Council discussed one item under the solicitor-client privilege exception at the July 26 meeting, which did not fit within the parameters of that exception.

75 There were also some procedural violations that were identified including:

- The Municipality's procedure by-law does not provide for public notice of special meetings. Section 238(2.1) of the Act requires that the by-law provide for notice to the public of all meetings.
- Council committed three procedural violations when it added items to the agenda at three meetings we reviewed without following the requirements of its procedure by-law, which states that a majority of Council must approve the addition or amendment for it to receive consideration.
- Council committed three procedural violations when it passed resolutions to proceed *in camera* at three meetings that did not provide a description of the general nature of the matter to be considered at the closed meeting, as required by s. 239(4) of the Act.

76 During our investigation, we also observed some problematic practices, including:

- Council added an item to the agenda at the last minute even though there was no urgency to the matter.
- Council failed to report back on what was discussed during the closed session.

- Council's closed session minutes do not always accurately reflect all relevant discussions that took place *in camera*.

77 I am making the following recommendations, which I hope will help council for the municipality of Central Huron meet its legal obligations with respect to closed meetings as well as generally improve its closed meeting practices.

Recommendations

Recommendation 1
The Municipality of Central Huron should ensure that discussions that take place in closed session under an exception to the *Municipal Act's* closed meeting requirements are limited to those matters that council is permitted to discuss in closed session under the exceptions in the Act.

Recommendation 2
Council for the Municipality of Central Huron should avoid adding agenda items at the last minute unless they are truly urgent. In cases where an item comes to council's attention after the agenda is prepared, efforts should be made to amend the agenda prior to the meeting. When adding an item at the council meeting, the requirements of the procedure by-law should be followed.

Recommendation 3
When proceeding *in camera*, council for the Municipality of Central Huron should pass a resolution that provides a general description of the subject matter to be discussed.

Recommendation 4
When directing staff during an *in camera* session, council for the Municipality of Central Huron should pass a resolution that clearly states the direction being given.

Recommendation 5
The Municipality of Central Huron should audio and/or video record all *in camera* meetings and store such recordings in a confidential and secure fashion for future reference.

Recommendation 6
The council for the Municipality of Central Huron should follow a practice of reporting back publicly after a closed meeting, in at least a general way, on all matters considered *in camera*.

Recommendation 7
The Municipality of Central Huron should amend Section 10 of its procedure by-law so that the wording of the exceptions to the open meeting requirements is in keeping with the language of s. 239 of the *Municipal Act*.

Recommendation 8
The Municipality of Central Huron should revise its procedural by-law to formalize its practice of providing notice to the public of meetings by posting the agenda on its website the Friday prior to the meeting. It should also ensure that the by-law provides for notice to the public of all meetings, including special meetings.

Recommendation 9
All members of council for the Municipality of Central Huron should be vigilant in adhering to their individual and collective obligation to ensure that council complies with its responsibilities under the Act and its own procedure by-law.

Report

78 My report should be made available to the public as soon as possible, and no later than the next council meeting.

André Marin
Ombudsman of Ontario